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No. 71-1224

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALFRED EDWARD McGEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willful refusal to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a).

Petitioner registered with his local board on August 14, 1961 (SSF 1),[1] and, except for a brief interval not here relevant, he held a student (II-S) deferment from January 14, 1964, until May 28, 1968 (*ibid.*). He was then classified I-A, and was ordered to report for induction on January 28, 1969

[1] "SSF" references are to petitioner's Selective Service file, a copy of which is on file with the Clerk of this Court.

(SSF 25). Petitioner reported, but refused to submit to induction (SSF 29).

Following his refusal, petitioner's file was forwarded to the State Director, and on February 10, 1969, the State Director returned the file to the local board with directions that the outstanding induction order be cancelled and petitioner's I–A classification be reopened for the purpose of curing certain procedural irregularities (SSF 34).[2] The local board reopened petitioner's classification, and, on March 11, 1969, he was again classified I–A (SSF 36).

Upon receipt of his Notice of Classification, petitioner notified his local board on April 10, 1969, that he wished to appeal (SSF 38). He also requested and received an appointment with a government appeal agent (SSF 39, 40). Following this appointment on April 14, 1969, petitioner notified his local board that he wished to claim a hardship (III–A) deferment (SSF 41); he also submitted information to the board in support of his claim (SSF 43, 44). On May 14, 1969, he was notified that the local board had considered the deferment request and had determined that his claim did not warrant a reopening of his classification (SSF 48). Petitioner's file was then transmitted to the State Appeal Board (SSF 51). On May 21, 1969, that board voted unanimously to classify petitioner I–A (SSF 63).

Thereafter, on May 27, 1969, the local board requested and received from the State Director authority

[2] None of these procedural irregularities is at issue in the present petition.

to increase its June 11, 1968, induction call so as to include petitioner (SSF 32). It then mailed petitioner an order to report for induction on June 11, 1968 (SSF 33). Petitioner reported as ordered but refused induction (SSF 37); his indictment, trial and conviction followed.

Petitioner's sole contention here is that the addition of his name to the June 11 induction call was improper. While we agree with petitioner that the procedure followed here should not be encouraged, we do not believe on the facts of this case that he has demonstrated a basis for invalidating his order of induction.

1. At the time that petitioner had exhausted his administrative appeal rights and been finally classified I-A by the State Appeal Board, he was only two and a half months shy of his 26th birthday. He had thus succeeded in deferring his obligation to the military for almost eight years. Until he reached the age of 26, he was, under the regulation then in effect (32 C.F.R. (1967 ed.) 1631.7(a)),[3] subject to call in the third highest priority group, behind delinquents and volunteers under the age of 26.[4] Thereafter, he became a member of the fifth highest priority group (32 C.F.R. (1967 ed.) 1631.7(a)(5)), thus virtually eliminating any possibility that he might be called.

Petitioner has offered no evidence indicating that the local board acted improperly in requesting permission from the State Director to add petitioner to

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[3] The regulation is set forth in full at Pet. App. 13a–14a.

[4] Since petitioner was unmarried, he was not in the fourth priority group. See 32 C.F.R. (1967 ed.) 1631.7(a)(4).

the induction call before his 26th birthday. Given his age and his clear eligibility for induction at the time of the May 1969 request, the likelihood is that he was not taken out of turn. It is thus not surprising that his counsel declined to probe the order of call issue at trial either on cross-examination of the government witnesses or on direct examination of witnesses called for the defense.[1] As the court below correctly points out (Pet. App. 5a), petitioner had "the burden of proving the order of the call was irregular." Having failed to make any effort to meet that burden, it was entirely proper in the present circumstances for the courts below to invoke the presumption of regularity with respect to the order of call (see *Yates* v. *United States*, 404 F. 2d 462, 466 (C.A. 1)).

2. Nor do we find any rational basis for concluding that the State Director exceeded his authority in granting the local board's request. This is not a case like *Gutknecht* v. *United States*, 396 U.S. 295, for example, where a registrant is being ordered to induction for essentially punitive purposes. Nor do we have here a situation where the order of induction is in disregard of a deferment or exemption to which petitioner was plainly entitled. Compare *Oestereich* v. *Selective Service Board*, 393 U.S. 233. Petitioner had

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[1] Petitioner called as a defense witness the only government official competent to testify on the issue of order of call—the Supervisor of the Chicago South Office of the Selective Service System—but asked no questions on that point and made no reference to the May 1969 request by the local board (Tr. 86). The issue was first raised in support of a motion for judgment of acquittal (Tr. 189–191) after both sides had rested (Tr. 165).

been placed in Class 1–A by the State Appeal Board; he was at the time in question under the age of 26. Thus, the State Director's action in permitting petitioner's name to be added to the June call was not in excess of his authority.

Petitioner speculates that by adding him to the June 11 order of call, the State Director may have exceeded the allotted quota of the number of men that could have been drafted in the state in that month. He has offered no evidence in support of that supposition, however. Nor do we believe that there is much basis for such an assumption. Once the National Director has established the state quota (see 32 C.F.R. (1967 ed.) 1631.5, reproduced at Pet. App. 12a), the matter of allocating to the local boards within the state the number of men to be called rests solely in the discretion of the State Director (see 32 C.F.R. (1967 ed.) 1631.6, reproduced at Pet. App. 12a–13a). And, if one or more of the local boards fails to fill its Notice of Call (see 32 C.F.R. (1967 ed.) 1631.7(a), reproduced at Pet. App. 13a–14a), it is plainly permissible for the State Director, as was apparently done in this case, to increase the allotment of one of the other local boards which had already been filled. Since here the increase involved induction of but one more individual, it appears highly unlikely that the State Director's authorization resulted in any irregularity. Moreover, in view of the absence of any evidence indicating otherwise, the presumption is in favor of regularity. See *Yates* v. *United States, supra*, 404 F. 2d at 466.

3. Finally, petitioner's claim that he was prejudiced by the challenged procedure because it deprived

him of an opportunity to make additional claims for deferment or exemption is not well taken. He has already had almost eight years to formulate such claims and present them to his local board. Even now, he does not assert that he is entitled to deferred or exempt status; he merely states that, given more time, he "might have presented a prima facie case for a 1-Y [medical] deferment" (Pet. 13). But, in July 1968 and again in January 1969, petitioner had been found medically acceptable for induction (SSF 59A, 59E).

4. We also point out that, subsequent to petitioner's failure to submit to induction in the present case, the Selective Service regulation relating to order of call was substantially revised to provide for the existing random selection lottery system (Executive Order 11563, October 3, 1970; 32 C.F.R. (1971 ed.) 1631.7). Under that system, there is a different priority grouping for purposes of determining the order of induction, one that is geared essentially to the "random sequence number established by random selection procedures" (see 32 C.F.R. (1971 ed.) 1631.7(b)(2)(3)(4)), rather than to the age of the registrant. Accordingly, it is unlikely that the issue raised in the present petition will reoccur in future cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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